CONNIE NIELSON

IBLA 86-94 Decided May 6, 1988

Appeal from a decision of the District Manager, Moab, Utah, District Office, Bureau of Land Management, determining damages for willful trespass. UT-060-4501.

Set aside and referred for hearing.

1. Evidence: Sufficiency -- Hearings -- Trespass: Generally

Where the Bureau of Land Management has assessed treble damages for a willful trespass for the unauthorized removal of sand and gravel in excess of that stated in a contract for sale of sand and gravel, but the record is unclear how BLM computed trespass volume and the Bureau's appraised value of sand and gravel deposits is challenged, there is sufficient question of fact for the Board to exercise its discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

APPEARANCES: R. Scott Howell, Esq., and George A. Hunt, Salt Lake City, Utah for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Connie Nielson has appealed from a decision of the District Manager, of the Moab, Utah, District Office, Bureau of Land Management (BLM), dated September 19, 1985, assessing treble damages in the amount $ 24,157.80, 1/ for willful trespass in violation of 43 CFR 3603.1 based on the unauthorized removal of 13,421 cubic yards (cy) of sand and gravel from a gravel pit located near Bluff, Utah, in SE 1/4 NW 1/4, sec. 28, T. 40 S., R. 22 E., Salt Lake Meridian, San Juan County, Utah (UT-060-4501).

The original contract for sale of 7,996 cy of gravel at $ 0.25 per yard for a total purchase price of $ 1,999 was executed by Connie Nielson and the BLM Area Manager, April 28, 1981 (UT-060-MPI-2). Section 1 of the contract

1/ BLM noted in its decision that appellant's check for $ 4,697.35 was accepted for partial payment of trespass damages on March 12, 1985, leaving a balance due of $ 19,460.45.

described the contract area as containing 50 acres more or less "the exact description as marked on the ground." It provided further in section 18 that the "area will be stocked [staked] by purchaser and BLM to determine the 8000 yards." Section 3 stated that the contract would expire when the permitted yardage was recovered. Under Section 10(b) of the contract, the purchaser would be liable for treble damages for willful trespass if materials were removed after expiration or cancellation of the contract. 2/ On May 22, 1981, BLM made its original survey of the Bluff Gravel Deposits establishing its base data on the site and completed the first topographical base map of the area.

On February 22, 1983, after a compliance check of the permit area, BLM noted extensive activity at the site and recommended contacting Nielson to determine the amount of gravel he estimated had been removed. On May 2, 1983, a second topographic map of the Bluff gravel deposits was prepared after a survey was completed by the Moab District engineering staff. A volumetric determination was made showing that sand and gravel in excess of the volume sold to Nielson under contract UT-060-MPI-2 had been removed. 3/

By letter of March 8, 1984, BLM notified Nielson that sales contract UT-060-MPI-2 had terminated stating, "the material you contracted for had been removed by May of 1983 and you are no longer authorized to continue to extract gravel at the site." The letter also advised appellant that he would have to pay for any material removed above and beyond the expired contract volume at the penalty rate. Subsequent BLM compliance checks of the area on June 26, July 9, and August 6, 1984, revealed continued activity and excavation at the site.

An appraisal was completed and approved on August 27, 1984. It concluded that the fair market value of mineral material in place was $ 0.90 per cy. On September 24, 1984, a third survey of the site was completed by BLM engineers and a new updated topographical map was made, indicating the then current volumetric determination at the site. Based on a comparison of that latest survey with earlier surveys and topographical maps, BLM prepared a computation sheet and volume summary dated October 5, 1984, which contained calculations of volume of material removed from the site from 1981 to 1984. The sheet included two separate calculations for trespass volume as of October 5, 1984, i.e., 11,386 cy and 13,421 cy. No distinction is made between the two sets of figures. The only explanation is a note regarding

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2/ This section specifically states:

"(b) If Purchaser extracts or removes any mineral materials sold under this contract during any period of suspension, or if Purchaser extracts any of such material after expiration of the time for extraction of the cancellation of this contract, such extraction or removal shall be considered a willful trespass and render Purchaser liable for triple damages." (Emphasis in original).

3/ The case record indicates that in June 1983 Nielson was notified by telephone that he had exceeded his sale volume and BLM agreed to start processing another sale for additional gravel. Although an environmental analysis was approved for this new sale at $ 0.35 per cy, this contract was never executed.

the difference between the two calculation results, which states: "the apparent error of 2,035 cy is within +/- 7 1/2% error index computed by Robert Dalla during the original photogrammetric plat of the gravel pit site."

A formal Notice of Trespass, was issued on October 9, 1984. A copy of the notice is not contained in the casefile, however, the cover letter which accompanied the notice instructs Nielson to cease the alleged trespass action immediately. BLM issued trespass letters and demands for payment to Nielson on November 30 and December 31, 1984, and January 31 and March 4, 1985, assessing treble damages, using an appraised value of $ 0.90 per cy for a trespass volume of 13,421 cy amounting to $ 36,236.70 plus interest and administrative charges. Nielson disagreed with that value and responded March 8, 1985, by submitting a check in the amount of $ 4,697.35 to cover 13,421 cy of material removed in trespass at $ 0.35 per cy.

After a meeting March 19, 1985, at which appellant and BLM attempted to resolve the disagreement regarding the amount owing, BLM gave appellant an opportunity to present evidence to refute the trespass and to challenge the appraised value of the product removed. On April 11, 1985, appellant submitted a list of four transactions in which sand and gravel in the area was sold for $ 0.25 to $ 0.35 per cy.

BLM approved a second appraisal on September 13, 1985, that estimated the fair market value of mineral material at the Bluff site to be $ 0.60 per cy as of July 3, 1985. The appraisal used the market data approach, considered six sales in the area, and found four to be comparable. Two of those sales were submitted by Nielson. Based on the new appraisal BLM reviewed the Nielson trespass damages and adjusted its total downward to reflect the lower value of $ 0.60 per cy, and issued the September 11, 1985, decision recalculating the amount due to be $ 4,157.80 (13,421 cy x triple the appraised value of $ 0.60 per cy), less the $ 4,677.35, or $ 19,460.45.

Nielson has appealed, requesting the Board to remand the case to an Administrative Law Judge for an evidentiary hearing on certain questions of fact, asserting: (1) the BLM record does not establish an unauthorized removal of gravel from the site by appellant; (2) the BLM record does not establish that the proper value of the gravel removed from the site is $ 0.60 per cubic yard; (3) the BLM record does not establish the quantity of sand and gravel removed from the site; and (4) appellant has not been given the opportunity to contest or to supplement the BLM record relied upon by the District Manager for his decision.

BLM has responded that appellant has acknowledged "a willful taking of gravel from public lands after his contract allowing him to do so had been terminated" (BLM Answer at 2; emphasis in original). It asserts that the appraisal of $ 0.60 per cy is accurate and more than fair to appellant and is adequately supported by the record. It argues that the failure to stake the sale area by both BLM and appellant during the term of the contract did not excuse the trespass and was irrelevant after its termination. BLM contends that the volumetric determination is based on detailed information in the record which was made available to appellant at the October 22, 1984, meeting.

BLM argues that the facts of record establish appellant removed sand and gravel from the permitted area in excess of his contracted volume and after he was notified that his contract had terminated. The regulation at 43 CFR 3603.1 provides for damages for unauthorized use and removal of mineral materials from public lands:

> Except when authorized by sale or permit under law and the regulations of the Department of the Interior, the extraction, severance or removal of mineral materials from public lands under the jurisdiction of the Department of the Interior is unauthorized use. Unauthorized users shall be liable for damages to the United States, and shall be subject to prosecution for such unlawful acts (see Subpart 9239 of this title).

In addition, section 10(b) of the contract of sale provides that appellant would be liable for triple damages for willful trespass if he removes material from the sale site after expiration or cancellation of the contract. Thus, BLM concludes that appellant's trespass was willful, and that he is liable for trespass damages.

The pit was never staked to determine what areas would encompass 8,000 cy of sand and gravel. However, it is not unreasonable to assume that appellant would know when he had removed 8,000 cy of material. Although there is no apparent explanation why appellant and BLM did not stake the exact area to be worked at the Bluff site as called for in section 18 of the contract, the fact that the area was not defined would not alter the terms of the contract to permit appellant to continually work the site and to remove deposits in excess of 8,000 cy.

The record confirms that appellant paid $ 4,697.25 for what he considered to be the market value of excess yardage removed. Had he not taken an excess volume of material from the site, it does not follow that he would be willing to pay any amount. Appellant is hard pressed to argue that he did not remove an excess volume of material from the Bluff site. We agree with appellant, however, that BLM has not provided sufficient evidence to support its conclusion that 13,421 cy of excess material was removed.

[1] The record is not clear as to when the excess material was removed or how BLM arrived at its determination of the volume of material removed from the Bluff site between 1981 and 1984. BLM has assessed triple damages for willful trespass based on unauthorized removal of 13,421 cy of material. Appellant raises legitimate questions on appeal as to how and why BLM determined 13,421 cy to be the proper volume removed in trespass. We recognize that appellant argues, but provides no evidence to support his contention, that a lesser volume had been taken between 1981 and 1984. The file, however, does include computations by BLM that indicate that a lesser volume could have been removed. In any case, appellant has not had the opportunity to challenge BLM's calculations or the three surveys of the area used as a basis for the volumetric determinations. There is no explanation in the record to show why the higher figure of 13,421 cy was used, rather than the lower calculation of 11,386 cy listed on the BLM summary computation sheet. We find the BLM note indicating 13,421 cy was "acceptable because it fell within a +/- 7 1/2 percent error index" to be insufficient support for BLM's

election. We are unable to determine from the present record whether BLM's volume calculation was proper for this trespass. Volume determination is critical to the computation of trespass damages.

Appellant also challenges the appraised fair market value of the sand and gravel. BLM appraised the sand and gravel at $ 0.60 per cy, while appellant argues that the value is not supported by the record and that $ 0.25 to $ 0.35 cy is the fair market value. Appellant did not submit his own appraisal to challenge BLM's appraisal, but has submitted a list of sales to support his claim that the value of the sand and gravel was $ 0.25 to $ 0.35 per cy. BLM considered two of the transactions comparable and used them to form its opinion of the fair market value. Appellant has consistently argued that, at most, the 1983 BLM proposed contract price should be the value. The BLM appraiser did not consider either the amount used in the original sale in 1981 or the 1983 proposed sale of the sand and gravel from the Bluff site in making his determination of value. We believe a more complete record needs to be developed, with evidence presented to resolve this issue. Where there are disputed facts essential to resolution of legal issues, this Board has the discretionary authority to order an evidentiary hearing before an Administrative Law Judge pursuant to 43 CFR 4.415. Edward L. Johnson, 93 IBLA 391 (1986); State of Alaska, 86 IBLA 263 (1985).

Accordingly, pursuant to 43 CFR 4.415, we hereby refer the matter to the Hearings Division, Office of Hearings and Appeals, for a hearing and decision as to the volume of sand and gravel removed by appellant in excess of the original contract volume of 8,000 cy; for a determination of the fair market value of the sand and gravel removed in trespass; and for computation of the trespass damages for which appellant is liable. The Administrative Law Judge's decision shall constitute the final Departmental decision in this matter unless an appeal to the Board is filed within 30 days from receipt of the decision. At the hearing, BLM shall have the burden of going forward to establish a prima facie case in support of its trespass charges. However, Nielson shall have the ultimate burden of showing that the charges are improper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case referred for hearing and decision by an Administrative Law Judge.

Gail M. Frazier
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Bruce R. Harris
Administrative Judge